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THE DOCTRINE OF SURVIVORSHIP AND THE DEFINITION OF A VESTED REMAINDER.

THERE probably is not a more cited case in the law of survivorships than the leading case of *Moore v. Lyons*,¹ which, in 1840, firmly laid down the rule of construction that words of survivorship *prima facie* refer to death in the lifetime of the testator, rather than to death in the lifetime of the life-tenant. In a devise, therefore, to one for life, and from and after his death to two others (naming them), or to the survivor of them, the remainderman takes a *vested interest at the death of the testator* even though one of them predeceased the life-tenant. The words of survivorship refer to the death of the testator, and not to the death of the tenant for life, unless from other parts of the will it be manifest that the intent of the testator was otherwise. The adverbs "from" and "after," and the like, in such a devise are held to indicate the time when the remainder or remainders shall take effect *in enjoyment*, and not the time they should vest.

The above was also the early English rule. However, in 1819, or thereabouts, the English courts began to turn from this rule of construction to one which made the words of survivorship *prima facie* refer to the time of distribution or death of the life-tenant, as defining who should inherit, rather than to the period of the death of the testator,² and many of the jurisdictions in this country have followed the English courts in this digression.³ The early English doctrine was adopted in the States of New York,⁴ Michigan,⁵ Pennsylvania,⁶ Indiana,⁷ Maryland,⁸ Illinois,⁹ Virginia,¹⁰ and Georgia.¹¹ The discussion of the relative merits of these rules has been more or less controversial, and led an eminent American author in his work on Wills to dispose of the subject with the remark that "into

¹25 Wend. 118.

²*Cripps v. Wolcott*, 4 Madd. 11.

³Kentucky, Massachusetts, New Hampshire, New Jersey, North Carolina, South Carolina, Ohio, California, Wisconsin; with a possible tendency that way in Illinois (see *Ridgeway v. Underwood*, 67 Ill. 419; *Blatchford v. Newberry*, 99 Ill. 11; *Carpenter et al. v. The Sangamon L. & T. Co.*, 229 Ill. 486) and in Maryland (see *Slingluff v. Johns*, 87 Md. 273).

⁴*Moore v. Lyons*, 25 Wend. 119; *Connelly v. O'Brien*, 166 N. Y. 406.

⁵*Rood v. Hovey*, 50 Mich. 395; *Porter v. Porter*, 50 Mich. 456.

⁶*Woelpper's App.*, 126 Pa. St. 562.

⁷*Taylor v. Stephens*, 165 Ind. 200.

⁸*Branson v. Hill*, 31 Md. 188; but see *Slingluff v. Johns*, 87 Md. 273.

⁹*Hempstead v. Dickson*, 20 Ill. 193; *Arnold v. Alden*, 173 Ill. 229; *Kohtz v. Eldred*, 208 Ill. 60; see *Carpenter et al. v. The Sangamon L. & T. Co.*, 229 Ill. 486.

¹⁰*Jameson v. Jameson*, 86 Va. 51.

¹¹*Crossley v. Leslie*, 30 Ga. 782; Civ. Code, 1911, § 3680.

the long drawn controversy over this change of construction we shrink from entering."¹² Mr. JARMAN in his excellent work on Wills concludes the chapter on Survivorships with a caution by quoting Sir W. P. WOOD, V. C., in an old English case: "This word 'survivor' is certainly one that ought to be avoided by any person who is not a consummate master of the art of conveyancing, for I suppose no word has occasioned more difficulty."¹³

The real reason for the early English rule seems to have been mooted, because not always apparent from the decisions. It will be found, however, upon a study of the authorities, that the desire to avoid disinheritance of descendants and posterity is the underlying principle running through all the cases. The English courts in the early cases, in applying the rule, aptly said that "it is unnatural to suppose that the testator meant to disinherit the posterity of those dying first," and "that there is no reason because a man lived longest and had a better constitution, therefore he should be entitled to the whole estate."¹⁴

The policy of the courts—to avoid disinheritance of posterity—became further apparent, in the early days of the application of the rule, when cases came before it where such a construction would have plainly done violence to the language of the devise. The courts then, whenever possible, referred the words of survivorship to some other event, rather than to the death of the life-tenant, in order to avoid disinheritance. Of course, where a *clear, plain and manifest* intent to limit the remainders to those surviving the death of the life-tenant could be gathered from the whole will, the above rule of construction was made to yield, but the burden of proof of establishing such an intention was placed upon him who asserted it.¹⁵

An interesting phase of this subject is presented by the application of the rule in the presence of the statute defining a vested remainder or, in its absence, the common law definition of a vested remainder. The question of such a conflict or inconsistency was raised in a case recently decided in New York.¹⁶

The framers of the New York revision of 1830 defined vested remainders to be such as "are vested when there is a person in being

¹²Schouler on Wills, 2nd Ed. § 565.

¹³Jarman on Wills, § 1563.

¹⁴Wimple v. Fonda, 2 Johns. R. 268; Barker v. Giles, 2 Peere Wms. 280.

¹⁵Scott et al. v. Guernsey et al., 48 N. Y. 106; Low v. Harmony, 72 N. Y. 408, 414; Kelo v. Lorillard, 85 N. Y. 177; Matter of Brown, 93 N. Y. 295; Stokes v. Weston, 142 N. Y. 433; Clark v. Clark, 23 Misc. 272; Woelpper's App., 126 Pa. St. 562; Jameson v. Jameson, 86 Va. 51; Kohtz v. Eldred, 208 Ill. 60.

¹⁶Brooklyn Trust Co. v. Phillips, 134 App. Div. 697, 701; Affirmed, without opinion, 201 N. Y. 561.

who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."¹⁷ Michigan has the identical statute.¹⁸ KENT says that the common law "definition of a vested remainder appears to be accurately and fully expressed in the New York Revised Statutes."¹⁹ The question, of course, becomes relevant only in the jurisdiction that has adopted the early English doctrine of survivorships and follows New York in the definition of a vested remainder.²⁰

The definition requires that there exist "an immediate right of possession" in the remainderman, were the intermediate or precedent estate to become vacant, in order to constitute the devise to him a vested remainder. In other words, there must be a present capacity to take effect in possession, if the precedent estate were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines. That is the test applied in New York, and in the states that have adopted the New York definition.²¹

But what is meant by "a person in being who would have an immediate right of possession?" Reverting again, for purposes of illustration, to the devise to one for life, and from and after his death, to two others (naming them), or to the survivor of them, the rule in *Moore v. Lyons* refers the survivorship clause to *and makes the remainder interests vest upon the death of the testator*. Let us suppose, however, that the remainder is devised to the two others (naming them), *on their attaining lawful age*, or to the survivor of them *on his or her attaining lawful age*, and the remaindermen or remainderman surviving at the time of the testator's death are or is in infancy. The survivorship clause being referred to the death of the testator, under the rule, so as to give the survivors or survivor a vested remainder, can it be said that the infants are persons "in being who would have an immediate right of possession if the precedent estate were to become vacant" so as to come within the statute? A devise to the husband for life, and upon his death to her son "if he should live until he is 21 years of age," with devise over in case he should die under 21 years of age, etc., was held to have vested

¹⁷ R. S. of N. Y. 723, § 13; the statute has since been amended to read "it is vested when there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates." Cons. Laws, 1909, page 3380, Real Prop. Law, § 40.

¹⁸ Howell's Annot. Statutes of Michigan § 5529. Compiled Laws, § 8795.

¹⁹ Kent's Comm. 202-207.

²⁰ See *Croxall v. Sherard*, 5 Wall. 288; *Smith v. West*, 103 Ill. 332; *Scotfield v. Olcott*, 120 Ill. 362; *Davidson v. Koehler*, 76 Ind. 398; *Wood v. Robertson*, 113 Ind. 323; Civ. Code of Ga., 1911, § 3676.

the remainder in fee in the infant upon the death of the testator or testatrix.²² So, also, a devise to the testator's father, remainder to the child of the testator "after the decease of my father and when he the said child shall become 21 years of age," etc., with devise over in the event of the death of the child before age.²³ So, also, in a very recent case at circuit, where the devise was to the daughter for life and after her death to her two children, naming them, "or to the survivor of them on his or her attaining lawful age."²⁴

In all of the above cases the remainder was held to vest upon the death of the testator, and the question of a conflict with the statute defining a vested remainder was not raised. In a case recently decided, however, the court intimated that the infants would not have "an immediate right of possession" were the precedent estate to become vacant, under the statutory definition of a vested estate.²⁵

The law probably is well settled that an estate devised to an infant when or if or until he attains the age of 21 years, is a devise *in praesenti*, and conveys the fee so as to vest in the infant;²⁶ but that does not explain the possible inconsistency with the statute. Whether this or the rule in *Moore v. Lyons* be relied upon, can it be said that an infant has the immediate right of possession in the above cases? In order to apply the definition, the suspension during minority must be considered either an "intermediate or precedent estate" as is that of the life-tenant, or it must be held that the infant has the "immediate right of possession." The definition reads that remainders "are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."

The inconsistency, if any, can be cleared up only on the theory that such a devise during infancy passes on something more than a precedent or intermediate estate, and gives the infant the "immediate right of possession on the ceasing of the intermediate or precedent estate." Mr. Justice GRAY, in *Townsend v. Frommer et al*,²⁷ in interpreting the statute as applied to a remainder interest, says, an "immediate right, I take it, exists by force of some gift in remainder made directly by the grantor or testator." A gift carries with it the

²²See 24 Am. & Eng. Encycl. of Law (2nd Ed.), 388; *Moore v. Littel*, 41 N. Y. 66.

²³*Kelso v. Lorillard*, 85 N. Y. 177.

²⁴*Roome v. Phillips*, 24 N. Y. 463.

²⁵*Clark v. Peters*, 68 Misc. 252.

²⁶*Brooklyn Trust Co. v. Phillips*, 134 App. Div. at pages 701 and 702; affirmed without opinion, 201 N. Y. 561.

²⁷*Radley v. Kuhn*, 97 N. Y. 26, 35; Gerard on Titles to R. E., 5th Ed., 227; Reeves on Real Prop., page 1161; *Boraston's Case*, 3 Coke 19.

²⁸125 N. Y. at page 468.

immediate right of possession, and that immediate right of possession may be an immediate right of *future* possession, as well as it may be an immediate right of present possession. In the case of a devise in remainder, it is an immediate right of future possession. KENT says that at common law "an estate is vested when there is an immediate right of personal enjoyment, or a *present fixed right of future enjoyment*;" that "it is not the uncertainty of enjoyment in future, but the uncertainty of the *right* to that enjoyment which marks the difference between a vested and contingent interest," and that the common law "definition of a vested remainder appears to be accurately and fully expressed in the New York Revised Statutes."²⁸ Although it has been questioned that the definition of a vested remainder as contained in the New York Revised Statutes is declaratory of the common law,²⁹ KENT's dictum to this effect has acquired sufficient footing to be generally so accepted by jurisdictions that follow the New York decisions.

As in the case of the statute against suspension of alienation,³⁰ disability from infancy is not aimed at by the statute defining a vested remainder. The words "on his or her attaining lawful age" do not postpone or suspend the *right* of possession. WASHBURN on the subject of vested remainders says "The present capacity of taking effect in possession if the possession were now to become vacant * * * universally distinguishes a vested remainder from one that is contingent." He then says "By *capacity* as thus applied is not meant simply that there is a person *in esse* interested in the estate who has a natural capacity to take and hold the estate, but that there is further no intervening circumstance in the nature of a precedent condition which is to happen before such person can take."³¹ The words "on his or her attaining lawful age," and the like, do not import a condition precedent, but a condition subsequent.

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²⁸4 Kent's Comm. 202-207; 24 Am. & Eng. Encycl. of Law, 400.

²⁹Smaw v. Young, 109 Ala. 534.

³⁰Shannon v. Pentz, 1 App. Div. 331; Radley v. Kuhn, 97 N. Y. 26, 35.

³¹2 Washburn on Real Prop., §§ 228, 229; Fearné Cont. Rem. 216.